STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 14, 2005
v	No. 254942 Ingham Circuit Court
CONRADO LAMAS GONZALEZ, Defendant-Appellant.	LC No. 02-000176-FC

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for assault with intent to do great bodily harm less than murder, MCL 750.84. He was acquitted of assault with intent to commit murder, MCL 750.83. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to twenty to forty years' imprisonment. We affirm defendant's conviction and sentence, but remand for correction of a clerical error in defendant's judgment of sentence.

Defendant first argues that the trial court abused its discretion in allowing Officer Daren Duso's testimony that crime scenes that he had been to, where the individual was beaten worse than the victim in this case, were usually murder scenes. We disagree. We review a trial court's decision on the admissibility of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Additionally, because defendant did not timely object to the testimony or request that the relevant answer be stricken, see *People v Jones*, 468 Mich 345, 354-355; 662 NW2d 376 (2003), we review for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that Duso's testimony was speculative. However, Duso's testimony was based on his perceptions of the victims at crime scenes he had responded to in the past as a police officer. Duso was informing the jury that when he observed crime scenes in the past where the victims were beaten worse than the victim in this case, they were usually murder scenes. This testimony was proper and not speculative. "[A]ny witness is qualified to testify as to his or her physical observations and opinions formed as a result of these observations." *People v Grisham*, 125 Mich App 280, 286; 335 NW2d 680 (1983). Additionally, the testimony was helpful to the jury because defendant's intent was at issue. See *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001) ("evidence is admissible if it is helpful in throwing light on any material point").

Defendant next argues that the trial court erred in declining to grant defendant's motion for a directed verdict on the assault with intent to murder charge. We disagree.

We review a trial court's ruling on a directed verdict de novo to determine if, considering the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Aldrich, supra* at 122. Defendant argues there was insufficient evidence presented at the trial of an intent to murder to sustain the assault with intent to commit murder charge. Specific intent to kill is required, and an intent to do great bodily harm or wanton or willful disregard for the recklessness of one's conduct will not be sufficient evidence of an intent to commit murder. *People v Cochran*, 155 Mich App 191, 193-194; 399 NW2d 44 (1986). Reasonable inferences arising from the facts in evidence can prove an intent to kill. *People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985). Because it is difficult to prove state of mind, minimal circumstantial evidence is required. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

We agree with the trial court that there was sufficient evidence of an intent to murder to withstand the motion for a directed verdict. The victim testified that defendant beat her over a time period of about four hours, during which defendant threatened to kill her many times. The victim also testified that defendant choked her until she lost consciousness and hit her in the head until she lost consciousness. Defendant put her a chokehold, put a knife to her throat, and again threatened to kill her. The numerous medical personnel who testified at trial stated that, compared to other victims of beatings, this victim's injuries were some of the worst they had seen. Hence, the trial court did not err in denying the motion for a directed verdict. *McRunels, supra* at 181-182.

Defendant next argues that he was denied effective assistance of counsel when his trial counsel failed to request a jury instruction on assault as a lesser included offense of assault with intent to commit murder. We disagree. Whether defendant was denied effective assistance of counsel is a mixed question of fact and law. *People v Riley* (*After Remand*), 468 Mich 135, 139; 659 NW2d 611 (2003). "A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. Factual findings are reviewed for clear error, and the constitutional determination is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because there was no *Ginther*[1] hearing held in the trial court, this Court's review is limited to mistakes that are apparent from the trial court record. *Riley, supra* at 139.

To establish ineffective assistance of counsel, a defendant must first show that counsel's "representation fell below an objective standard of reasonableness," *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Toma, supra*, at 303, citing *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). A court is to instruct on a lesser offense if it is necessarily included in the greater offense and if a rational

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

view of the evidence supports the instruction. *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). "'Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense.'" *Id*., quoting *People v Mendoza*, 468 Mich 527, 532 n 3; 664 NW2d 685 (2003).

One of the elements of assault with intent to commit murder is an assault. *People v Abraham*, 234 Mich App 640, 657-658; 599 NW2d 736 (1999). Therefore, assault is a necessarily included lesser offense of assault with intent to commit murder. However, a rational view of the evidence presented at trial did not support giving the jury this instruction. There was evidence that the victim endured being beaten by defendant for approximately four hours. The victim testified that defendant hit her with fists and a belt, kicked her, choked her, put a knife to her throat, and dragged her throughout the home by her hair. The victim lost consciousness twice and at one point was coughing up blood. The victim sustained serious injuries, which required her to be admitted overnight to the hospital. In sum, there was no evidence of mere simple assault as opposed to assault with intent to do great bodily harm, and a rational view of the evidence did not support an instruction on assault. Because the jury instruction on assault would not have been proper, defendant cannot show that his trial counsel erred. Failure to present a meritless motion is not ineffective assistance of counsel. *Riley*, *supra* at 142.

Defendant finally argues that the trial court erred when it departed from the guidelines in this case. We disagree. In reviewing a sentence where the trial court departs from the guidelines, we review the existence or nonexistence of a particular factor for clear error; we review de novo whether that factor is objective and verifiable; and we review whether an objective and verifiable factor constitutes a substantial and compelling reason to depart from the guidelines for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). In this context, an abuse of discretion standard

> acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. [*Id*. at 269 (citations omitted).]

MCL 769.34(3) allows a court to depart from the applicable guidelines range if the court has substantial and compelling reasons for doing so and states the reasons on the record. The trial court stated that the reason it was departing from the guidelines in this case was the excessive violence, brutality, terrorism, and "just plain evil" that the victim was subjected to during the crime.

We find that the court did not clearly err in its determination that this factor existed. The record clearly shows that the victim was subjected to a brutal beating that lasted approximately four hours. She was dragged around her home by her hair, beaten and choked until she lost consciousness. At one point when she regained consciousness, defendant was kicking her. Defendant held her at knifepoint and threatened to kill her. He attempted to break her fingers and gouge her eye out. When the victim started to cough up blood, defendant became angry and dragged her by her hair to a bucket, which he had urinated in, and had her cough the blood in

there. When the victim was able to escape and run to a neighbor's home, defendant came after her, yelling. Again, hospital personnel rated the victim was as being one of the worst victims of a beating that they had seen. Clearly, the record supported the factor cited by the trial court regarding the violent and brutal nature of the crime.

We also hold, as a matter of law, that this factor was objective and verifiable. The term "'"objective and verifiable" has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.'" *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003), quoting *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991). The record confirmed the brutality and violence of this crime.

We also find that this factor is one that that "'"keenly" or "irresistibly" grabs our attention'; is 'of "considerable worth" in deciding the length of a sentence'; and 'exists only in exceptional cases.'" *Babcock, supra* at 258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995) (footnote omitted). MCL 769.34(3)(b) states:

> The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

Although the offense variables, specifically OV 7, take into account the factor cited by the trial court, we find that the trial court did not abuse its discretion in determining that the factor was given inadequate weight and that it constituted a substantial and compelling reason for an upward departure. Defendant was scored fifty points for OV 7 for treating the victim with terrorism, sadism, torture, or excessive brutality. MCL 777.37(1)(a). However, the trial judge stated that in twenty-five years on the bench, he had never seen a case where a person survived that was treated with the "excessive violence, brutality, terrorism and just plain evil that this [victim] was subjected to." The trial court noted that the beating lasted for hours. Although defendant was scored fifty points for OV 7, the nature of this beating "keenly" and "irresistibly" grabs our attention and is "of considerable worth" in deciding the length of defendant's sentence. *Babcock, supra* at 258. The severity of the victim's injuries, the verbal threats made to the victim, and the length and nature of the beating make this assault stand out as being excessively violent and brutal. Thus, we find no abuse of discretion in the trial court's upward departure from the sentencing guidelines.

Finally, we note sua sponte that defendant's judgment of sentence was amended on January 13, 2004, to include restitution as a condition of parole. The attached paperwork references a different defendant and case number and a home invasion conviction. Defendant's judgment of sentence should be amended to remove this restitution requirement that evidently resulted from a clerical error.

Defendant's conviction and prison sentence are affirmed. But we remand this case to the trial court for correction of a clerical error in defendant's judgment of sentence regarding restitution. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff